Supreme Court, U.S.
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No. 99-1019

In the Supreme Court of the United States

WORTHINGTON CORPORATION,
Petitioner,

v.

ELAINE RONSINI, EXECUTRIX OF THE ESTATE OF FRANK RONSINI

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

FRANK H. GRIFFIN III
PHILIP W. VOGLER
GOLLATZ GRIFFIN
& EWING, P.C.
16th Floor
Two Penn Center Plaza
Philadelphia, PA 19102
(215) 563-9400

JERROLD J. GANZFRIED
Counsel of Record
KAREN L. MANOS
ALEXANDER B. BERGER
HOWREY SIMON ARNOLD &
WHITE, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Attorneys for Petitioner
Worthington Corporation

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

The petition explained three dispositive reasons for this Court to grant review. First, by second-guessing a military procurement decision, the decision below directly impinges upon the federal government's constitutional authority and duty to provide for the common defense. Second, the decision below conflicts with this Court's articulation of the government contractor defense in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), and *Hercules Inc. v. United States*, 516 U.S. 417 (1996). Third, there is an acknowledged split among the federal appellate courts on the question presented; the outcome in this case would have been different in four and possibly five of the seven circuits that have considered the issue. Pet. 15-19.

Respondent fails even to address the fundamental issues of federalism. With respect to the clear split of authority on the standard for applying the government contractor defense in duty-to-warn cases, respondent offers a pastiche of contradictory and incorrect propositions. For example, respondent argues inconsistently that the decision below both "follows" *Boyle* and "correctly ruled" that because military specifications did not affirmatively prescribe or prohibit a warning -- an element foreign to *Boyle* -- the jury was not entitled to consider the government contractor defense. Opp. 8-9. A similar flaw in respondent's argument is its repeated effort to masquerade the clear conflict in the circuits as simply the manifestation of idiosyncrasies in state law. *See, e.g.*, Opp. 13 ("solely on the basis of Maryland products liability law"); 14 n.7 ("applying the law of Georgia . . . there was no duty to warn"); 19-20, n.12 ("product liability principles peculiar to New Jersey"); *see also id.* at 7 n.5 ("New York's discrete judgment molding principles"). That argument proves our point. The government contractor defense is a feature of federal law that requires a uniform national standard. Under no rational

system can a supplier's wartime duty to the military be defined 50 years later by 50 different state courts.

Contrary to respondent's failure to perceive the glaring conflict of authorities, the judges before whom this question arises have repeatedly acknowledged the circuit conflict. Decisions of the Sixth Circuit and district courts in Maryland, New Jersey, New Hampshire, Wisconsin and the District of Columbia have all expressly commented on the lack of appellate unanimity. *See* page 6 nn. 5-6, *infra*. Absent any principled basis for reconciling the disparate decisions on an important and recurring question of federal law -- on which uniformity is constitutionally mandated -- this Court's review is plainly warranted.

Nor should the Court be dissuaded from granting certiorari by respondent's dissembling recitation of the record in this case. Notwithstanding respondent's rhetorical barbs, petitioner raised the government contractor defense at trial, unsuccessfully requested a jury instruction that quoted *Boyle* verbatim, argued the issue in the Appellate Division (which held that the jury need not be instructed on the government contractor defense), and raised the issue again in seeking review in the New York Court of Appeals. Pet. 5-7; Pet. App. 73a; Opp. 2-3. Finally, there is no merit to respondent's facile declaration that the record lacks evidence on elements of the government contractor defense. Opp. 2, 6. Contrary to respondent's extraordinary distortion of the record, there were indeed facts sufficient to establish the defense and that should have led to the entry of judgment in petitioner's favor or, at least, required resolution by a correctly instructed jury. Precisely because most of the federal appellate courts would have reversed the judgment in this case, the conflict of authority could not be more concrete and deserving of this Court's guidance.

1. Contrary to respondent's argument, the decision below directly conflicts with this Court's decision in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). The departure from *Boyle* is starkly evidenced in the trial court's charge to the jury, Pet. App. 73a, and the Appellate Division's holding, *id.* at 3a.

At trial, Worthington established each of the requisite elements of the government contractor defense set forth in *Boyle*. As to the first *Boyle* prong, the United States approved reasonably precise specifications. Worthington had no involvement whatsoever in the design of the equipment; the equipment was built to plans and standards of an entirely different company, DeLaval, which were supplied *to* Worthington *by* the Navy.[1] App., *infra*, 79a. The Navy's detailed plans and specifications included express requirements for asbestos-containing components, markings on the equipment, and the contents of the technical manuals,[2] and Worthington was prohibited from making any

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[1] It is not the case that Worthington "made all of its machinery the same way, regardless of whether it was sold to the Government." Opp. 5. Just the opposite is true. *E.g.*, Pet. App. 48a. The compressors were used to operate the torpedo tubes on naval destroyers. *Id.* at 55a. And there is no evidence that Worthington ever sold any of these Navy destroyer pumps commercially. Failing to find any evidentiary support in this trial record for its incredible assertions, respondent instead relies on opinions in other cases, including one decided on a jurisdictional motion to remand a removed action to state court. Opp. 5 n.3.

[2] The military specifications not only required asbestos gaskets in the equipment, but also required that all replacement gaskets meet the original specifications. App., *infra*, 83a-90a. Moreover, the gaskets themselves were governed by detailed military specifications requiring the gaskets to be made from a specified type of asbestos material. *Id.*; Pet. App. 51a-53a. Accordingly, there is no merit to respondent's assertion that there was no military specification for the replacement parts. Opp. 6, 17 n.10.

modifications or additions to the equipment or technical manuals without Navy approval. Pet. App. 42a, 48a, 50a-59a, 63a-65a; App., *infra*, 79a-85a.

As to the second *Boyle* prong, Worthington's equipment conformed to the Navy's specifications. Pet. App. 48a-49a, 54a. As to the third prong, there were no dangers in the use of the equipment known to Worthington but not known to the United States. *Id.* at 36a-39a. Respondent's assertion (Opp. 3-4) that "the jury found, that Worthington had actual and constructive knowledge of the extreme hazards of the asbestos placed in or over its equipment" is flatly incorrect. Respondent fails to cite any evidence, nor is there any, that Worthington had *actual* knowledge of any danger to workers like Ronsini;[3] the jury was neither asked to make, nor ever made, any such finding, Pet. App. 15a-20a; and the trial court expressly and correctly found that there was no evidence that Worthington actually knew of any risk to workers like Ronsini. *Id.* at 8a.[4] That in itself is sufficient to satisfy the third element of *Boyle*. *See, e.g., Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1001 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997) ("*Boyle* does not require the contractor to warn the government of every possible

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[3] Instead, respondent points (Opp. 4) to a 1944 article about dust diseases that discussed asbestosis in the insulating trade, an entirely different industry and a work environment totally unlike what respondent encountered in 1972 when working with replacement gaskets placed inside of pumps Worthington sold 30 years earlier. App., *infra*, 77a-78a.

[4] Respondent attempts to brush aside the trial court's express, undisturbed finding on this point, characterizing it as an "unrelated" ruling "concerning New York's discrete judgment molding principles." Opp. 7 n.5. Respondent's argument misses the mark. The trial court reviewed evidence of knowledge in ruling on Worthington's post-trial motion to dismiss the finding of recklessness and its determination is unconditional and unequivocal. Pet. App. 8a.

danger – only those known to it and not to the government"); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1487 (5th Cir.) ("After *Boyle* a government contractor is only responsible for warning the government of dangers about which it has actual knowledge"), *cert. denied*, 493 U.S. 935 (1989).

In sharp contrast to Worthington's lack of knowledge, respondent's expert witness admitted that the United States knew of the dangers of asbestos as early as 1918. Pet. App. 36a-38a. He also testified that the Navy was aware of the hazards of asbestos in the workplace at least as early as 1947, and recommended in Naval publications that appropriate ventilation systems be used to reduce asbestos hazards, that workers be given respirators, and that dust level counts be taken to determine whether a hazard existed. App., *infra*, 76a. Thus, there is nothing about which Worthington could have warned that the United States did not already know.

Against this background, respondent Ronsini testified that when he came in contact with the pumps more than 25 years later, the Navy provided no mask or respirator, App., *infra*, 91a; the Navy assigned him to work on the engines in a windowless room with no fresh air, *id.* at 91a-92a; the ship was in a war zone, *id.* at 93a; although he wanted fresh air, neither he nor anyone else left the engine room while working, Pet. App. 33a; and he never complained to anyone about the conditions because "[i]t wasn't like a regular job. It wasn't a union." *Id.* at 34a.

Despite this factual predicate, the trial court denied Worthington's proposed jury instruction that incorporated the language of *Boyle* verbatim. Pet. App. 67a-71a. The Appellate Division went one step further, concluding that unless the United States affirmatively prescribed or

prohibited a warning, an element not required by *Boyle*, the defense need not even go to the jury. *Id.* at 3a.

2. The decision below is not only contrary to *Boyle*, but also conflicts with the holdings of the majority of federal circuits that have considered the issue. Pet. 13-19. Studiously avoiding the core issues on which the lower courts have split, respondent seeks to alter the question presented by arguing that "Worthington wrongly suggests that no government involvement is required at all...." Opp. 12. The question presented is not *whether* the government was involved at all, but the *extent* of the government's involvement necessary to establish the defense.

Although respondent may not perceive a conflict, the courts trying these cases certainly do. The conflict has been acknowledged expressly by the Sixth Circuit[5] and district courts in Maryland, New Jersey, New Hampshire, Wisconsin, and the District of Columbia.[6] Even those

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5 *Tate v. Boeing Helicopters*, 55 F.3d 1150, 1157 (6th Cir. 1995) (rejecting view of circuits that require a "dictation or prohibition of warnings" because those circuits "require a higher level of government involvement than we think is required").

6 *Yeroshefsky v. Unisys Corp.*, 962 F. Supp. 710, 717-18 (D. Md. 1997) (collecting cases and describing three-way split); *Russek v. Unisys Corp.*, 921 F. Supp. 1277, 1292 (D.N.J. 1996) (collecting cases and following lead of Fifth and Fourth Circuits); *Ritch v. AM Gen. Corp.*, No. 93-451-SD, 1996 U.S. Dist. LEXIS 8361, at *8-*9 (D.N.H. Mar. 28, 1996) (noting that "[t]here is less agreement ... as to how to determine whether the government exercised the level of discretion required by Boyle's first condition in approving the subject warnings"); *Oliver v. Oshkosh Truck Corp.*, 911 F. Supp. 1161, 1182-83 (E.D. Wis.) (discussing split), *aff'd*, 96 F.3d 992 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997); *Haltiwanger v. Unisys Corp.*, 949 F. Supp. 898, 905-06 (D.D.C. 1996) (discussing split between the Second and Eleventh Circuits and the Sixth Circuit).

circuits that have tried to reconcile the varying positions have done so by *rejecting* the position adopted by the New York courts here. *See Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 1004 n.8 (7th Cir. 1996) (rejecting as inconsistent with *Boyle* the requirement that the government either "prohibit" or "dictate" the contents of warnings), *cert. denied*, 520 U.S. 1116 (1997).

In trying to explain away this acknowledged conflict, respondent makes sweeping claims of consistency, for which it cites only the Second, Ninth, and Eleventh Circuits, *viz.*, those that have adopted the minority view. Opp. 10. For example, respondent asserts that "in the warnings context, the courts consistently state the issue to be whether the contractor could have complied 'with both its contractual obligations and the state-prescribed duty of care' with regard to the warnings, and whether a 'conflict exists between the state tort duty and the federal contractual duty.'" *Id.* The Sixth Circuit emphatically rejected that very argument in *Tate v. Boeing Helicopters*, 140 F.3d 654, 660 (6th Cir. 1998).

Respondent's other attempts to reconcile the cases are no more availing. Contrary to respondent's argument (Opp. 13), *Emory v. McDonnell Douglas Corp.*, 148 F.3d 347 (4th Cir. 1998), does not support the proposition that a "failure-to-warn claim must be separately scrutinized for a 'significant conflict' as between state law requirements and Federal interests." Rather, the Fourth Circuit began its analysis by finding that the government contractor defense articulated in *Boyle* applies equally to design defect and failure-to-warn claims. 148 F.3d at 350. The court went on to hold that because the Navy had extensive knowledge of the dangers associated with the crash aircraft, the contractor had no duty to warn the Navy of potential hazards. 148 F.3d at 341-52. Moreover, contrary to the New York court's holding here,

the Fourth Circuit also observed that the plaintiff could not, in any event, maintain a claim that the contractor failed to warn individual military pilots about the unsafe condition of the aircraft. 148 F.3d at 352.

Similarly mistaken are respondent's assertions about the Fifth Circuit. *In re Air Disaster at Ramstein Air Base*, 81 F.3d 570, *modified sub nom.*, *Perez v. Lockheed Corp.*, 88 F.3d 340 (5th Cir.), *cert. denied*, 519 U.S. 1028 (1996), is not the "leading and most current Fifth Circuit opinion" to address the issue. Opp. 14. To the contrary, the district court in that case did not even rule on defendants' government contractor defense and applied a state statute of repose to bar plaintiffs' duty-to-warn claim. 81 F.3d at 573. In *dicta*, the Fifth Circuit stated that "[a] separate failure to warn claim may survive the government contractor immunity defense," but that "if the failure to warn claim is part of the design defect or unreasonably dangerous product theory of liability, then government contractor immunity applies." *Id.* at 576. In its subsequent modification of the opinion, the Fifth Circuit concluded that McDonnell Douglas had no duty to warn the Air Force, much less the individual pilots. 88 F.3d at 341. In any event, the *Ramstein* dicta is directly contrary to the Fifth Circuit's holding in *Bailey v. McDonnell Douglas Corp.*, that "whether the defense will apply cannot be determined by the label attached to the claim." 989 F.2d 794, 801 (5th Cir. 1993), *citing Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1317 (11th Cir. 1989), *cert. denied*, 494 U.S. 1030 (1990) (if applicability of the defense were to depend on the peculiarities of state tort law, then "state law could operate either to defeat the defense or to expand it improperly, and the defense could not be applied with the uniformity that is a key justification for application of federal common law").

In *Smith v. Xerox Corp.*, 866 F.2d 135 (5th Cir. 1989), by contrast, the Fifth Circuit directly addressed the issue, and affirmed summary judgment based on the government contractor defense, holding that the plaintiff's design defect, breach of warranty, *and* failure-to-warn claims were barred as a matter of law because Xerox had established the three elements of *Boyle*. Contrary to respondent's assertion here (Opp. 15), the appeal in *Smith* was not confined to the design defect cause of action, and the Fifth Circuit drew no distinction between the two causes of action, concluding instead that both were equally barred by the government contractor defense.[7] *See Bailey v. McDonnell Douglas Corp.*, 989 F.2d 794, 800 (5th Cir. 1993) ("[W]e stated in *Smith* ... that '*Boyle* ... held that the government contractor defense applies to both negligence and strict liability actions, as well as to other state law tort claims.' We then affirmed a summary judgment based on the defense that dismissed all claims, including manufacturing defect, design defect, failure to warn, and breach of warranty").

Respondent's argument with regard to the Sixth Circuit is particularly disingenuous. Respondent argues (Opp. 17-18) that there is a "consensus" that the contractor must show a "continuous back and forth" review. That is incorrect. There are two different ways to satisfy the first element of *Boyle*: Either the government can provide the precise specifications to the contractor, *Boyle*, 487 U.S. at 509 n.8, as occurred here, *or* the contractor can develop the

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[7] The fact that *Smith* stated it was consistent with *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984), merely confirms that the Fifth Circuit applies the *Boyle* test without regard to the type of product liability claim. *McKay* was a pre-*Boyle* design defect claim in which -- unlike in later duty-to-warn cases -- the Ninth Circuit did not require any showing that the United States affirmatively prescribed or prohibited warnings.

specifications and there is a "continuous back-and-forth" between the contractor and the government. *Koutsoubos v. Boeing Vertrol*, 755 F.2d 352, 355 (3d Cir.), *cert. denied*, 474 U.S. 821 (1985). Because the Navy supplied the specifications to Worthington, there is no need even to consider whether any "back-and-forth" occurred.

3. The conflicting decisions in the lower courts show that there is a pressing need for this Court to establish a single, clear national standard for application of the government contractor defense in duty-to-warn cases. As reflected in the *amicus* brief filed by Bell Helicopter Textron, Inc., this issue is not confined to asbestos-related cases; it has broad application to all government contractors and raises substantial practical concerns for the federal government generally and the military in particular. Moreover, the issue implicates core constitutional notions of federalism. This Court should heed the request of lower courts and articulate the correct national standard.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

FRANK H. GRIFFIN III
PHILLIP W. VOGLER
GOLLATZ GRIFFIN
& EWING, P.C.
16th Floor
Two Penn Center Plaza
Philadelphia, PA 19102
(215) 563-9400

JERROLD J. GANZFRIED
Counsel of Record
KAREN L. MANOS
ALEXANDER B. BERGER
HOWREY SIMON ARNOLD &
WHITE, LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
Worthington Corporation

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APPENDIX

APPENDIX J

Excerpts From the Trial Transcript (November-December 1996)

[reprinted in Plaintiff's CA App. A506-A507]

Castleman - by Plaintiff - Cross/McTiernan

Q. So I am correct, doctor, am I not, that the United States Navy, as early as 1947, was aware of the association between asbestos and disease and the need to protect workers in the navy by the use of appropriate ventilation systems, and where appropriate, respiration devices and the appropriate checking of dust levels in the naval work environment, correct?

A. Yes.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 707-709]

Castleman - Plaintiff - Direct

Q. And where -- first of all, what trade magazines are you aware of that discussed hazards of asbestos?

A. Well, Asbestos Magazine carried a couple of notices about pulmonary asbestosis in 1928 and in 1930, but not after that for a long time.

Q. And as far as you understand, based on your review of the information that you've compiled in doing your book and your thesis, what was the reason for them stopping publishing these articles?

MR. GARRY: Objection.

MR. McTIERNAN: Objection

THE COURT: Sustained.

Members of the jury, disregard that question.

Q. You said the article stopped being published when?

A. March of 1930.

Q. Now, to whom did Asbestos Magazine go out to?

A. Companies that were mining asbestos and using it in manufacturing, primarily they were the ones who were the main advertisers, they were the ones whose products

were discussed, whose patents were discussed, whose new products were being marketed, and so on, were discussed.

Q. Were there any other trade magazines where the hazards of asbestos were discussed, that you're aware of?

A. Yes.

Q. What other trade magazines?

A. One was called Heating and Ventilating Magazine; that was sent to construction contractors. And in 1944, carried an article about dust diseases by Professor Hutchinson, who talked about asbestosis, and talked about asbestosis as a hazard to people in the insulating trade.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1826-1829]

Arsi - Defendant/Worthington - Direct/Garry

Q. Let me stop you there, Mr. Arsi. You mentioned DeLavalle, and I noticed on the drawing it says DeLavalle plan number G 10194H.

Do you know why the name DeLavalle is on this particular drawing?

A. Yes. These particular pumps that were manufactured by Worthington are actually to DeLavalle standards and plans, that was typical during World War II, and in other times when the government had high demand and there was limited production, they would take standardized drawings with government standard information on it and supply it to the manufacturers in the country during time of war to be able to support the efforts, so when you had to produce 70, 80, 100, 200 boats all between 1943 and 1944, they weren't just going to go to the original designers, they went to all the other people in the industries to buy all sorts of things, they supplied to many industries, but for pumps it was very normal to do this, so this is actually DeLavalle pumps.

This long continuous bar is the shaft of the pump, and it spins these impellers, it happens to be two in this pump, and where it spins and comes out of the pump it has to be sealed, and these small crosshatch pieces are the packing rings.

These can be inserted into the pump and tightened down so that there is just a little bit of leakage that comes out of the pump. It's what stops the pump from

leaking literally all over the floor, or in this case all over the decks of the ship.

If I look at the various balloons for these packing rings or if I look for the numbers over here, I can find that the packing, which is piece number 65, says packing ring, quantity is six, the material is cotton case plastic metallic.

Q. Is that asbestos containing?

A. No, it is not.

MR. GARRY: Objection.

THE COURT: Sustained. Let the witness testify. Reframe the question.

A. Under this column it gives the naval department --

THE COURT: Could we have a question please?

Q. Mr. Arsi, the packing material that you just referred to, what kind of packing is that?

A. It is a packing used in higher temperature applications for boilers and condensates that is a plastic metallic described in the government specification with an outer cotton case, a wound cotton case.

Q. Okay. Now, with respect to any asbestos containing components, can you point out to the jury which if any would be found in this particular piece of equipment?

A. Yes, I can. This pump is put together in two halves and bolted together to hold it together. There would

be a gasket that would hold these two halves together, and it is identified as gasket 1/64th inch, asbestos fiber, and I believe that is the only gasket that is asbestos fiber.

There are other gaskets for small components like a coupling, and that you'll see over here is manila paper.

So by reviewing this drawing and these identifications, I know how the pump was built and what was in it, including the materials in construction.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1863-1867]

Arsi - by Defendant Worthington - Cross

Q. Mr. Arsi, besides the pumps that were being sold to the government, Worthington had asbestos gaskets and packing and pumps in other machinery that wasn't being sold to the government but was being sold to other customers, correct?

MR. GARRY: Objection, Judge.

THE COURT: If you know.

Overruled.

A. I don't know. I believe so.

Q. I mean that wasn't unique just to government equipment, was it, Mr. Arsi?

A. No, gaskets and packing are common to much machinery and equipment.

Q. Including asbestos containing gaskets and packing, correct?

A. Yes.

Q. Now, you've already told us, Mr. Arsi, that the pumps -- well let's -- the pumps sold for use on naval ships during this period contained asbestos gaskets and packing, correct?

MR. GARRY: Objection.

THE COURT: Overruled.

A. Are you referring to the context of the pumps in question today?

Q. Yes.

A. Yes, I have.

Q. And Worthington knew that when these gaskets or packings were removed from the pumps and the compressors, whatever machinery was sold to the government, they would be replaced with the same kind of materials that were in the original, correct?

MR. GARRY: Objection.

THE COURT: Sustained.

Members of the jury, disregard that question.

Q. Well, are you aware whether the gaskets and packings that were contained in your pumps during this period would be replaced with the same kind of materials that were in the original pump and equipment?

MR. GARRY: Object to the form of the question.

THE COURT: Sustained.

Q. Mr. Arsi, you told us that there were certain specifications in the Navy, correct?

A. Yes.

Q. And those specifications said that the pumps had to have certain gaskets and certain packing, correct?

A. They reference styles of and types of, yes.

Q. And Worthington supplied to the government, when they first supplied the equipment, the packing and gaskets that were part of the specification, correct?

A. That is correct.

Q. And Worthington had no reason to believe that as that packing and gasket was replaced, the same kind of gasket and packing as testified would be used?

MR. GARRY: Objection to the form.

THE COURT: Sustained.

Q. Do you have any knowledge about the kind of material that would be replaced in your pumps for that year class?

MR. GARRY: Objection to the form.

THE COURT: Overruled.

A. The type of packing or gaskets or any other components of the parts, would be sourced from the parts list that are on the drawings.

Q. And if this part list says that there's an asbestos component, it would be replaced with asbestos component, fair enough?

A. Yes, I believe so.

Q. That's something Worthington would have known?

MR. GARRY : Objection to form.

THE COURT: Sustained.

Members of the jury, disregard the question.

Q. Well, from all of your understanding of the history of Worthington, and your review of all the records and your discussions, that's something Worthington would have known --

MR. GARRY: Objection to the form.

THE COURT: Sustained. You have two questions in there. I'm not sure either one could be asked, even if you asked them separately.

Q. Based on your knowledge, you know that asbestos gaskets are specified by the government would be replaced in your equipment, do you not?

MR. GARRY: Objection

THE COURT: Overruled.

A. I know that the original plans and specifications required asbestos materials.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1941-1943]

Merrick - Defendant/Worthington - Direct/Garry

Q. Now, I think you testified, sir, that the folks at Worthington knew that these gaskets and packings had to be replaced in the normal use of this compressor, correct?

A. Yes.

(continued on next page.)

Q. The people at Worthington knew you were aware that these gaskets and packings would be replaced with the same kind of materials that were in the originals, correct?

MR. BLUTMAN: Objection

THE COURT: I'm going to sustain the objection.

Members of the jury, disregard the question.

Q. There was a requirement of what kind of gasket had to be in the compressor, correct?

MR. BLUTMAN: I'm going to object, Judge.

THE COURT: Overruled.

A. Yes, there was a requirement for what was in the original compressor.

Q. And you supplied the gasket that the Navy wanted you to supply, correct? Worthington did?

A. Yes.

Q. And Worthington knew that when these gaskets were replaced, they'd be replaced with the same material that you were required to put in there, correct?

MR. BLUTMAN: Objection, Judge.

THE COURT: Sustained. Members of the jury, disregard that question.

Q. Well, based on your knowledge that you say you've accumulated over the years, was it your understanding that the replacement parts that were put in the compressors, namely the gaskets and packing, would be the same kinds of parts that you originally supplied?

MR. BLUTMAN: Objection.

THE COURT: Overruled.

A. What was supplied as spare parts, would have to match what the original equipment was. There was no spec for it, no mill spec for the material. Military specification.

[END OF EXCERPT]

* * *

[reprinted in Joint CA App. 1953-1956]

Merrick - Defendant/Worthington - Cross/Komitor

Q. Now, I'd like to have you turn to page 20 of this manual.

Do you see under the heading gaskets?

A. Yes.

Q. And could you read the first sentence to me?

A. The gaskets for the various points on the compressor should be made in accordance with material and Navy specifications indicated below.

Q. So was it Worthington's recommendation to its users that they should be using these types of gaskets, as specified on the next page?

MR. BLUTMAN: Objection.

THE COURT: Could you reframe the question, Counsel. Come on.

Q. Is it your understanding that it was Worthington's recommendation to the user of its compressors that the gaskets should be replaced in accordance with the specifications contained on page 21?

MR. BLUTMAN: Objection.

THE COURT: Overruled.

A. Could you repeat that now?

MR. KOMITOR: Maybe the court reporter can. Read this back, please

(Record read.)

A. I don't believe this is a recommendation, I think it's just a stating of a fact that they have to be made in accordance with that material.

Q. So it wasn't a recommendation, it was a requirement, is that what you're saying?

A. It's a fact. It states --

Q. So Worthington was stating in its own -- in its manual, that this is what has to be done, correct?

MR. BLUTMAN: Objection, Judge, he's indicated his answer.

THE COURT: This is cross-examination, there is some leeway, but you have to frame it properly.

Sustained.

Q. You're saying Worthington wasn't recommending this. Is it true then, Mr. Norton, that Worthington was telling the user these are the gaskets you have to use in replacement in our compressors?

MR. BLUTMAN: Objection, Judge.

THE COURT: Overruled.

A. The statement in here is a fact. I'm not saying that I recommended or Worthington represented it or who represented it. It's just a statement of fact.

Q. It was a statement made by Worthington in its manual, correct?

A. It's in our manual, yes.

[END OF EXCERPT]

* * *

[reprinted in Plaintiff's CA App. 121-124]

Q. Now, during this period of time when you were working on the ship, was your mouth or nose covered?

A. No.

Q. There was no mask or respirator made available to you?

A. No.

Q. Now, in getting into the engine room is it correct that there would be in effect like a hole that a man would climb down into?

A. Yeah; it was like a porthole.

Q. About how wide would that be?

A. It would be about the size of a manhole cover, about 36 inches around.

Q. And would there be any windows in the area where you were working?

A. No.

Q. And the dust that was around you, would that surround you all day while you were on the ship? Let's take the Weeks specifically.

A. Yes.

MR. DWYER: Objection.

BY MR. REICH:

Q. When it was surrounding you, the air that you were breathing, to your knowledge where was that air coming from?

A. There was some air coming from above deck and I think some air that was recirculating from below the engine room.

[END OF EXCERPT]

* * *

[reprinted in Plaintiff's CA App. 139-140]

Q. Now, you were in the war zone off Vietnam; correct?

A. Yes.

Q. And were you on the Weeks for 30 days at a time during this tour?

A. Occasionally.

Q. And during those tours were the five-inch guns being fired?

A. Yes.

Q. Now, when the five-inch guns were fired were you below deck?

A. Sometimes.

Q. Now, when you were below deck, what did you observe with respect to dust?

A. A vibration; and dust would be emitted into the room.

Q. And would it be greater in terms of dust than when you were working without the guns being fired?

A. Without the guns, yes.

Q. Why is that?

A. Because the guns would cause vibration that would knock it off the pipes and the turbines.

Q. Now, did any of the insulation come off any of the equipment during the time the guns were fired?

A. Not that I remember.

[END OF EXCERPT]

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